Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1994

STATE OF MISSOURI ex rel. GEORGE A. CHIAVOLA and CONNIE S. FLOTT,

Petitioners,

vs.

THE VILLAGE OF OAKWOOD, MISSOURI, WILLARD S. NORTON, JOHN W. GRIMWADE, MORRIS L. PHILLIPS, L. HOMER ORR and J. JERRY SHIELDS,

Respondents.

Petition For Writ Of Certiorari To The Missouri Court Of Appeals, Western District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Where the federal circuits are in total disagreement regarding the appropriate standard to apply to federal substantive due process challenges of local zoning decisions (*Pearson v. City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992)):

1. Whether it is arbitrary, capricious and unreasonable in violation of federal substantive due process for a municipality to enact and enforce a zoning ordinance without balancing the present and future needs of the community with the rights of private landowners through the use of a comprehensive plan, or alternatively without using any planning process or study whatsoever (*Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994)); and

2. Whether it is a *per se* and facial violation of federal substantive due process for a municipality to adopt and apply restrictive zoning without utilizing a comprehensive plan, or alternatively any planning process or study whatsoever (*Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).

LIST OF PARTIES

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Respondents.

Petition For Writ Of Certiorari To The Missouri Court Of Appeals, Western District

PETITION FOR A WRIT OF CERTIORARI

Petitioners George A. Chiavola and Connie S. Flott respectfully pray that a writ of *certiorari* issue to review the judgment and opinion of the Missouri Court of Appeals, Western District, in this case, transfer denied by the Supreme Court of Missouri, November 22, 1994.

OPINIONS AND ORDERS BELOW

The opinion of the Missouri Court of Appeals, Western District, is reported at 886 S.W.2d 74. Appendix

(App.), *infra*, A1-A19. The order of the Missouri Circuit Court, Clay County, entered July 29, 1993, granting Petitioners partial summary judgment and entering declaratory judgment, is not reported. It is reprinted in the Appendix, *infra*, A20-A21. The Missouri Court of Appeals, Western District, denied Petitioners' Motion for Rehearing and Motion for Transfer to the Supreme Court of Missouri on October 4, 1994. App., *infra*, A22. The Supreme Court of Missouri denied Petitioners' application for transfer on November 22, 1994. App., *infra*, A23.

JURISDICTION

The Circuit Court of Clay County, Missouri entered an order of partial summary judgment and declaratory judgment on July 29, 1993, declaring that Zoning Ordinance No.10 of the Village of Oakwood was arbitrary and unreasonable and therefore facially unconstitutional under the United States and Missouri Constitutions, and statutorily invalid. On August 9, 1994, the Missouri Court of Appeals, Western District, reversed the trial court. The Missouri Court of Appeals, Western District, denied Petitioners' Motion for Rehearing and Motion for Transfer to the Supreme Court of Missouri on October 4, 1994. Thereafter, on November 22, 1994, the Supreme Court of Missouri denied Petitioners' timely application for transfer. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States provides in pertinent part:

AMENDMENT V

> No person shall be held to answer for a capital, or otherwise infamous crime, except on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV, SECTION 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, section 10, of the Missouri Constitution provides:

> Section 10. That no person shall be deprived of life, liberty or property without due process of law.

The Missouri Statutes governing Zoning and Planning, MO.REV.STAT. §§ 89.040 and 89.340, provide in pertinent part:

> **89.040. Purposes of regulations**
>
> Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to preserve features of historical significance; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the values of buildings and encouraging the most appropriate use of land throughout such municipality.

> **89.340. City plan, contents – zoning plan**
>
> The commission shall make and adopt a city plan for the physical development of the municipality. The city plan, with the accompanying maps, plats, charts and descriptive and explanatory matter, shall show the commission's recommendations for the physical development and uses of land, and may include, among other things, the general location, character and extent

of streets and other public ways, grounds, places and spaces; the general location and extent of public utilities and terminals, whether publicly or privately owned, the acceptance, widening, removal, extension, relocation, narrowing, vacation, abandonment or change of use of any of the foregoing; the general character, extent and layout of the replanning of blighted districts and slum areas. The commission may also prepare a zoning plan for the regulation of the height, area, bulk, location and use of private, nonprofit and public structures and premises, and of population density, but the adoption, enforcement and administration of the zoning plan shall conform to the provisions of sections 89.010 to 89.250.

STATEMENT OF THE CASE

I. THE FACTUAL BACKGROUND

The Village of Oakwood, Missouri is a Missouri municipal corporation located in Clay County, and lies within the Kansas City Metropolitan Region. In March of 1955, the Village's five member governing body, known as the Board of Trustees, adopted Ordinance No.10, which has remained in effect since that time with only minor amendments. Ordinance No.10, the sole zoning ordinance of the Village, restricts all 80 lots located within the Village to large lot exclusive single-family residential use with a minimum lot size of 30,000 square feet. Ordinance No.10 does not permit any multi-family

residential uses and similarly prohibits any type of commercial land use anywhere within the Village. The Ordinance simply publicly adopted a private subdivision plat recorded in 1934, over 60 years ago without change, and has worked a significant hardship on and detriment to Petitioners.

In adopting, maintaining and enforcing Ordinance No.10, the Village judicially admitted and acknowledged in various depositions and interrogatories it has never employed any professional planning staff, has never consulted with any planning, engineering or public works professionals, and has engaged in no comprehensive planning process or study whatsoever. In preparing Ordinance No.10 and subsequent minor amendments to Ordinance No.10, the Village has never adopted a comprehensive plan or city plan as required by Missouri statute. MO.REV.STAT. § 89.040 ("Such regulations shall be made in accordance with a comprehensive plan. . . . ") and § 89.340 ("The commission shall make and adopt a city plan for the physical development of the municipality."). The Missouri Court of Appeals found that the "general plan" for the Village was to establish a small bedroom community, which can only be "inferred" from the existence of Ordinance No.10. App., *infra*, A6.

In 1981, George Chiavola and Connie Flott acquired a tract of land approximately six acres in size, which is located on the western side, and entirely within, the Village of Oakwood. This six-acre tract has approximately 620 feet which fronts directly onto North Oak Trafficway, which comprises a portion of the western border of the Village. In 1955, the area was rural in nature, but today

North Oak Trafficway is a major north-south transportation corridor carrying in excess of 25,000 cars and heavy trucks per day past the Chiavola/Flott tract. App., *infra*, A3. North Oak Trafficway passes through several municipalities in the northern portion of the Kansas City Metropolitan Region, which have zoned the roadway entirely commercial. Numerous retail shopping centers, office buildings, automobile dealerships, gasoline service stations, restaurants, and "fast food" establishments are situated on North Oak. Respondents admitted that no property along the Trafficway from several miles south (Vivian Road) to several miles north of the property (Barry Road) has had development for single-family residential use in more than 11 years. Immediately opposite the Chiavola/Flott property are intense commercial uses which include an automobile muffler shop, an automobile parts store, gasoline service stations, a large automobile dealership, and several office buildings.

In 1990 George Chiavola and Connie Flott petitioned the Village to amend Ordinance No.10 to include a "Local Commercial Zone" and to map 4.7 acres of their six-acre tract within a petitioner-proposed, advanced planned development site plan ordinance. The remaining 1.3 acres of the Chiavola/Flott tract furthest from North Oak Trafficway was to remain zoned for single-family residential use in order to provide single-family residential buffering for the single-family residential properties in the Village lying to the east of the property subject to the rezoning petition. On April 13, 1991, the Village Zoning Commission held a public hearing on the rezoning petition, and subsequently voted to recommend disapproval of the

rezoning. At this hearing, sworn expert planning, engineering, appraisal, environmental and transportation testimony demonstrated that the Chiavola/Flott property was not suited for single-family residential development, that commercial zoning was proper and appropriate, and that the Village had never prepared any plan, study or engaged in any planning process whatsoever in adopting the zoning ordinance in 1955 or to the present. The Village offered no evidence which contradicted the testimony offered on behalf of Chiavola and Flott. On June 3, 1991, the Village Board of Trustees held a public hearing to consider the rezoning petition, and voted without deliberation to deny the Chiavola/Flott petition.

II. PROCEEDINGS IN THE COURTS BELOW

On July 1, 1991, the present action was filed. Count I of the First Amended Petition, filed on April 2, 1993, sought declaratory judgment, alleging that Ordinance No.10 was arbitrary, capricious, unreasonable, invalid, and in violation of Article I, section 10 of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, because, *inter alia*, Ordinance No.10 was adopted without a comprehensive land plan and was maintained and enforced without the benefit of a comprehensive plan or any comprehensive planning process or study whatsoever. On July 29, 1993, the Circuit Court of Clay County, Missouri granted partial summary judgment and declaratory judgment as to Count I of Chiavola and Flott's First Amended Petition, finding the ordinance unconstitutional on its face under

the federal and Missouri constitutional due process provisions, as well as statutorily invalid. App., *infra*, A20-A21.

The Village of Oakwood and individual defendants appealed this decision to the Missouri Court of Appeals, Western District. On August 9, 1993, the Missouri Court of Appeals reversed the trial court's grant of summary judgment. The court considered separately questions of the facial constitutionality of Ordinance No.10, and the validity of Ordinance No.10 under Missouri statute. The Missouri Court of Appeals considered the following federal question: "Here it is asserted that on its face, Ordinance No.10 is unconstitutional. The due process clauses of the Fourteenth Amendment to the U.S. Constitution and the Missouri Constitution, Art. I § 10, require zoning 'to bear a substantial relationship to health, safety, morals or the public welfare.' " App., *infra*, A5. While the court framed the constitutional issue as a violation of both the United States and Missouri Constitutions, the court only tested Ordinance No.10 under Missouri constitutional standards. App, *infra*, A5-A9. The court found Ordinance No.10 constitutional under the Missouri due process standards.

As to the statutory challenge to Ordinance No.10, the court considered various interpretations by other state courts which dealt with statutory language, identical to the applicable Missouri statute, requiring that zoning ordinances "be made in accordance with a comprehensive plan." MO.REV.STAT. § 89.040. The Missouri Court of Appeals felt that the "better reasoned cases" were those decisions handed down primarily in the 1950s and 1960s that held a separate comprehensive plan was not required

to enact and enforce a valid zoning ordinance. App., *infra*, A13. The court also found that the preamble to Ordinance No.10 met the Missouri statutory comprehensive planning requirements because it indicated an intent on the part of Village Trustees to create a single residential district within the Village.

On October 4, 1994, the Missouri Court of Appeals, Western District, denied Chiavola and Flotts' Motion for Rehearing and Motion for Transfer to the Missouri Supreme Court.

On November 22, 1994, a timely filed Application to Transfer to the Missouri Supreme Court was denied. App., *infra*, A23.

REASONS FOR GRANTING THE PETITION

While the Missouri Court of Appeals, Western District, framed the constitutional issue as a facial violation of the due process clauses of both the Fourteenth Amendment to the United States Constitution and Article I, section 10 of the Missouri Constitution, the court only conducted analysis according to the standards set forth by the Missouri Constitution. The court failed to conduct any analysis which considered the trial court's grant of summary judgment on the grounds that the Village of Oakwood's zoning ordinance was facially unconstitutional as a denial of substantive due process in violation of the Fourteenth Amendment to the U.S. Constitution. App., *infra*, A5-A9. This issue presents an important question of federal law which has not been, but should be,

settled by this Court and is the subject of considerable confusion among the federal circuit courts nationwide.

I. This Court should resolve the sharp conflict that exists among the federal circuits regarding the proper standard to apply to federal substantive due process challenges of municipal zoning decisions.

It is a violation of substantive due process for a property owner to be subjected to arbitrary and capricious government action in the denial of a rezoning request. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 373 (1926); *Nectow v. City of Cambridge*, 277 U.S. 183, 187 (1928). While this Court has held that review of local zoning on arbitrary and capricious substantive due process grounds is valid in appropriate cases, the Court has never set forth a definitive standard of review. The Court has explicitly declared, however, that property owners have a substantive due process right not to be subjected to arbitrary, capricious or irrational zoning decisions. This case presents the inescapable conclusion that a zoning ordinance adopted and maintained without any study, plan or planning process violates such a standard. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 4 (1974).

The federal circuits are in hopeless disarray regarding the proper standard to be applied to substantive due process challenges of zoning decisions. On this matter, the Sixth Circuit Court of Appeals has opined in despair: "The lack of uniformity among the circuits in dealing

with zoning cases of the 'arbitrary and capricious substantive due process' category is remarkable." *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1217 (6th Cir. 1992).[1]

The First, Fifth, Seventh, Ninth and Eleventh Circuits demonstrate great reluctance to intervene in local zoning matters. *Creative Env'ts, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir.), *cert. denied*, 459 U.S. 989 (1982). These circuits classify all zoning decisions, even as they pertain only to an individual parcel of land as in the present case, as legislative. *Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield*, 907 F.2d 239, 243-45 (1st Cir. 1990); *Horizon Concepts, Inc. v. City of Balch Springs*, 789 F.2d 1165, 1167 (5th Cir. 1986); *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 468 (7th Cir. 1988); *Southern Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 507 (9th Cir. 1990), *cert. denied*, 502 U.S. 943 (1991); *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir.), *cert. denied*, 498 U.S. 1120 (1991). These circuits exercise extreme deference to local zoning decisions, and all factual issues are

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[1] Upon its review of the disarray among the circuits, the Sixth Circuit lamented, "We wish it were within our power to harmonize these decisions, but the conflicts among the circuits are too great. Harmony will have to wait action by the Supreme Court." *Pearson*, 961 F.2d at 1220 n. 45. *Pearson* provides the Court with an excellent opportunity to appreciate fully the confusion that has been the result of this Court's inopportunity to set forth the standard of review for substantive due process challenges of zoning decisions. Since the time that this Court established the rule that the denial of substantive due process results from arbitrary or irrational zoning actions, *Euclid*, 272 U.S. at 395, the issue has been permitted to percolate among the federal circuits for a sufficiently long period of time to allow the circuits to establish conflicting standards.

subject to only a very limited scope of review reserved for legislative judgments. Bad faith violations of state law do not rise to the level of an unconstitutional deprivation of substantive due process. *Amsden v. Moran*, 904 F.2d 748, 757 (1st Cir. 1990), *cert. denied*, 498 U.S. 1041 (1991). In addition, "Courts have confused the standards" for just compensation, due process takings, and arbitrary and capricious due process, and "often cannot tell which claim has been brought or which standard is being applied." *Eide*, 908 F.2d at 722.

In contrast, the Sixth Circuit recognizes a distinction between zoning actions which are legislative in nature, and those as in our present case which involve administrative/adjudicative decisions which affects a zoning change for an individual parcel of land. A decision rendered by a legislative body that affects only a small number of persons, or alters the zoning of a specific parcel of land, is an administrative decision. When this is the case, as in the present case, the federal court is authorized to review the evidence that was before the state administrative agency or legislative body acting in adjudicative fashion. *Pearson*, 961 F.2d at 1222. Whereas, in reviewing legislative acts, the only permissible inquiry is whether the legislative action is rationally related to legitimate state land use concerns. *Curto v. City of Harper Woods*, 954 F.2d 1237, 1243 (6th Cir. 1992).

The Second and Tenth Circuits impose a strict property rights test as the first element of any substantive due process challenge to zoning decisions. This standard requires the property owner to demonstrate a constitutionally protected property interest before the court will consider whether governmental action has resulted in the

denial of substantive due process for a rezoning request. *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 915-16 (2d Cir.), *cert. denied*, 493 U.S. 893 (1989); *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111, 1119 (10th Cir. 1991) ("Authority in this circuit is unclear on what interest is required to trigger substantive due process guarantees."). The Third Circuit, in contrast, specifically declines to engage in the initial property interest test. *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir.), *cert. denied*, 488 U.S. 851, *cert. denied*, 488 U.S. 868 (1988).

The Third and Fourth Circuits, contrary to the other circuits, will grant relief based on substantive due process grounds if the zoning decision is irrational in the strict sense, or prompted by political, personal or discriminatory motives. *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 683 (3d Cir.), *cert. denied*, 112 S.Ct. 1668 (1992); *Bello*, 840 F.2d at 1129; *Marks v. City of Chesapeake*, 883 F.2d 308, 311 (4th Cir. 1989).

The Eighth Circuit is internally embroiled in a conflict regarding the proper standard to be applied to substantive due process challenges of zoning decisions. *Lemke v. Cass County*, 846 F.2d 469 (8th Cir. 1987), represents a standard that virtually forecloses any possibility of mounting a successful challenge to zoning decisions on substantive due process grounds. Only if the denial of a rezoning application is based on the equivalent of a coin flip would the *Lemke* court find a substantive due process violation has occurred. *Id.* at 472 (Arnold, J., concurring).[2]

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[2] "Such claims should, however, be limited to the truly irrational – for example, a zoning board's decision made by

The same court ruled in *Littlefield v. City of Afton*, 785 F.2d 596, 603 (6th Cir. 1986), that an arbitrary and capricious condition imposed on the granting of a permit states a valid substantive due process claim. *Accord Cunningham v. City of Overland*, 804 F.2d 1066 (8th Cir. 1986). Judge Arnold acknowledged in his concurring opinion in *Lemke* that *Lemke* cannot be harmonized with either *Littlefield* or the views of the other federal circuits. *Lemke*, 846 F.2d at 472 (Arnold, J., concurring).

Even if the deferential "coin flip" standard articulated by the Eighth Circuit were applied to this case, *Lemke*, 846 F.2d at 472, Ordinance No.10 would still not pass muster. It is patently arbitrary, unreasonable and irrational for the Village Trustees to decide in 1955 that the Village should be forever maintained as an insular residential community without the guidance of any plan, study or planning process whatsoever and without any concern for the changes occurring over the next 40 years. The Court should take this opportunity to harmonize the conflicting standards for federal substantive due process violations as articulated by the circuits. The Court will rarely be faced with a more glaring example of a split

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flipping a coin, certainly an efficient method of decisionmaking, but one bearing no relationship whatever to the merits of the pending matter." *Lemke*, 846 F.2d at 472 (Arnold, J., concurring). The court acknowledged that this effectively eliminated the possibility of a successful substantive due process challenge, pointing out that the Equal Protection Clause and other provisions of the Bill of Rights would continue to protect property owners. One should question, however, whether a zoning ordinance based on no study, plan or planning process could ever meet any rational basis test, no less even a coin flip.

among the federal circuits or a more patently irrational decision than a zoning regulation adopted without plan, study or planning process whatsoever. In addition, the Missouri Court of Appeals and other state courts need guidance regarding the proper standard to apply to the federal question presented by Petitioners' substantive due process challenge.

II. This Court should declare that it is a *per se* violation of federal substantive due process to enact and enforce a zoning ordinance without utilizing any plan, study or planning process to identify and support the future needs and land use policies of the community.

In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), this Court was presented with a facial attack of a zoning ordinance on the grounds that it was violative of the due process clause of the Federal Constitution. This Court held that, "Before the ordinance can be declared unconstitutional, [it must be shown] that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id.* at 395. In reaching its decision that the Village of Euclid had not violated federal substantive due process, the Court was fully informed by "comprehensive reports . . . which bear every evidence of painstaking consideration" that the division of residential, commercial and industrial areas was a valid municipal power. *Id.* at 394. *Euclid*, then, lays the foundation for Petitioners' argument that any zoning ordinance imposed upon the entirety of a community must be documented and supported with a comprehensive planning process.

In the present case, the Village of Oakwood has engaged in absolutely no study, plan or planning process with which to inform the Village Trustees' judgment that Oakwood should be established as, and forever maintained as, a "small bedroom community."[3] The Village has made no accommodation for those property owners who live along North Oak Trafficway, a totally commercialized transportation corridor, who wish to utilize their property in a manner which allows some use or value and which reasonably protects the remainder of the Village's residential character.

Zoning in this manner without planning becomes so haphazard and damaging to property rights as to rise to the level of arbitrary and irrational action which is sufficient to constitute a violation of basic substantive due process rights. "[T]o the extent that zoning is properly to be conceived of as the partial implementation of a plan of broader scope, zoning without planning lacks coherence

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[3] The Missouri Court of Appeals stated "there is evidence that planning was done. . . . " App., *infra*, A18. The court provides no citation to any planning documents, no reference to any official Village documents, no citation to any hearing transcripts, and no reference to any activities conducted by the Village which would provide such evidence. The court further indicated that, "The ordinance was comprehensive in scope; setting out the area, height, and use requirements." App., *infra*, A18. In this analysis, the court has fallen victim to confusing an ordinance which fully regulates each aspect of the permitted uses, and an ordinance which is the product of a *comprehensive planning process* which is conducted prior to, and separate from, enactment of the zoning ordinance. Daniel Mandelker, *The Role of the Comprehensive Plan In Land Use Regulation*, 74 MICH.L.REV. 900 (1976).

and discipline in the pursuit of goals of public welfare which the whole municipal regulatory process is supposed to serve." Charles M. Harr, *In Accordance With a Comprehensive Plan*, 68 HARV.L.REV. 1154 (1955). To ensure a rational allocation of land use, a municipality must undertake *some* manner of planning process to identify the needs and policies of a community with forethought toward the community's future land use problems. D. Mandelker, *The Role of the Comprehensive Plan in Land Use Regulation*, 74 MICH.L.REV. 900 (1976). Zoning will serve to "tyrannize individual property owners" if there is not at least a minimal effort to comply with the requirement that zoning be "in accordance with a comprehensive plan." *Udell v. Haas*, 235 N.E.2d 897 (N.Y.Ct.App. 1968); *see also* MO.REV.STAT. §§ 89.040 and 89.340.

This Court has recently declared that certain actions by a municipality may result in a categorical, or *per se*, violation of property rights. In *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2895 (1992), the Court declared that when the owner of real property has been called upon to sacrifice all economically beneficial uses of his land for the public good, he has suffered a *per se* taking.[4] In *Dolan v. City of Tigard*, 114 S.Ct. 2309, 2321

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[4] This Court emphasized in *Lucas* that its decision was grounded upon two discrete classes of regulatory action which created categorical takings: 1) compensation is required for physical invasions of property, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); and 2) compensation is required for regulation which denies all economically beneficial or productive use of land, *Agins v. Tiburon*, 447 U.S. 255 (1980); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

(1994), the Court decided that a municipality had not met its burden in establishing the need for a property owner to dedicate a portion of her real property to the city in exchange for a building permit. The *Dolan* decision was grounded upon the supposition that "[c]ities have long engaged in the commendable task of *land use planning*, made necessary by increasing urbanization particularly in metropolitan areas such as Portland." *Dolan*, 114 S.Ct. at 2322 (emphasis supplied). The Court specifically struck down regulatory provisions requiring dedication of land where there was no study to support the required proportionality of the dedication. The same holds true for the Kansas City Metropolitan Region, wherein the Village of Oakwood is attempting to maintain an insular, parochial, exclusionary residential community without any comprehensive plan, study or any comprehensive planning process whatsoever to accommodate and adapt the Village borders to the surrounding commercialization. The total lack of study and analysis is similar to this Court's *Dolan* decision in that its development approval condition of a dedication of land was void without *an appropriate study of its proportionality*.

III. This case presents a question of critical national importance.

Nearly all states have enacted enabling legislation for municipal planning and municipal zoning based on the Standard City Zoning Enabling Act drafted in 1926 by an

advisory committee to the Department of Commerce.[5] Section 3 of that act provides that zoning ordinances shall be made "in accordance with a comprehensive plan." All states which have passed enabling legislation based on the act have used this or substantially similar language to require that zoning be made on a base which is broader than itself.

The states which have enacted this language through their zoning enabling legislation fall into three categories regarding the planning that a municipality must undertake. The oldest view, as exemplified by the cases cited in the opinion below, is that a municipality does not need to enact a separate comprehensive plan but the zoning ordinance must represent in itself a rational planning exercise document. A second view is that a zoning ordinance adopted without a comprehensive plan will be a negative factor in weighing the constitutional reasonableness and validity of land use action. *See, e.g., Sharp v. Zoning Hearing Bd.*, 628 A.2d 1223 (Pa.Commw.Ct. 1993); *Udell v. Haas*, 235 N.E.2d 897 (N.Y.Ct.App. 1968). The current majority trend and third view is that the comprehensive plan is a separate and dispositive document in weighing the validity of land use action.[6]

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[5] Advisory Committee on City Planning and Zoning, U.S. Department of Commerce, A Standard City Zoning Enabling Act (1926).

[6] A large number of recent decisions confirms that the modern trend is to require a separate comprehensive plan with zoning ordinances in substantial conformity with that plan in order to support rational land use decisions. *See, e.g., F.S. Plummer Co. v. Town of Cape Elizabeth*, 612 A.2d 856 (Me. 1992); *Larson v. Wallowa County*, 840 P.2d 1350 (Or.Ct.App. 1992); *Lawler v. City*

Regardless of which view a state takes regarding the consistency required between the zoning ordinance and comprehensive planning, *all states assume that a municipality undertakes some form of comprehensive planning process.* It is the definition of arbitrary, capricious and unreasonable action for municipal officials to enact a zoning ordinance without considering the needs, requirements and future policies of the municipality before and after passing and enforcing the zoning ordinance. This Court should declare that to impose zoning requirements upon all property owners without conducting even a minimal amount of planning or study is arbitrary, capricious and unreasonable and a *per se* violation of substantive due process.

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of Redding, 9 Cal.Rptr.2d 392 (Cal.Ct.App. 1992); *Board of County Comm'rs v. Snyder*, 627 So.2d 469 (Fla. 1993); *City Council of Sussex County v. Green*, 516 A.2d 480 (Del. 1986); *Kaiser Hawaii Kai Dev. Co. v. City of Honolulu*, 777 P.2d 244 (Haw. 1989); *Pro-Eco, Inc. v. Board of Comm'rs*, 766 F.Supp. 1368, *aff'd*, 956 F.2d 635 (7th Cir. 1992) (Indiana); *Balser v. Kootenai County Bd. of Comm'rs*, 714 P.2d 6 (Id. 1986); *City of Lakeside Park v. Quinn*, 672 S.W.2d 666 (Ky. 1984); *Little v. Board of County Comm'rs*, 631 P.2d 1282 (Mont. 1981); *Zanin v. Iacono*, 487 A.2d 786 (N.J.Super.L. 1984); *Nova Horizons, Inc. v. City Council*, 769 P.2d 721 (Nev. 1989); *Camara v. City of Warwick*, 358 A.2d 23 (R.I. 1976); *Smith v. Town of St. Johnsbury*, 554 A.2d 233 (Vt. 1988). This Court considered the decisions and legislation of the states in the *Dolan* case in establishing the constitutional standard of rough proportionality backed by proper planning and studies. *Dolan*, 114 S.Ct. 2309 (1994).

CONCLUSION

Because of the importance of the questions presented, and for all of the reasons stated, George A. Chiavola's and Connie S. Flott's Petition for a Writ of Certiorari to the Missouri Court of Appeals, Western District, should be granted.

Respectfully submitted,

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February 17, 1995

APPENDIX

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE of Missouri ex rel. George A. CHIAVOLA and Connie S. Flott, Respondents, v. The VILLAGE OF OAKWOOD, Missouri, Willard S. Norton, John W. Grimwade, Morris L. Phillips, L. Homer Orr and J. Jerry Shields, Appellants.	Case No. WD 48239 Opinion Filed: August 9, 1994

APPEAL FROM THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI
Honorable David W. Russell, Judge
Before Lowenstein P.J., Spinden and Berrey, JJ.

This appeal stems from a trial court determination that the single zoning ordinance (Ordinance No. 10) of the Village of Oakwood (Oakwood), which allows only single family residential usage in Oakwood: (1) is unconstitutional on due process grounds; and (2) as being infirm because Oakwood failed to develop a comprehensive plan under s 89.040, RSMo 1986. The Appellant, Oakwood, is a small bedroom community located in Clay County, and is a suburb of Kansas City. Oakwood consists of 80 single family dwellings on 80 platted lots.

The Plaintiffs/Respondents (Landowners) filed a multi-count petition. The trial court granted summary

judgment on Count I which prayed for a declaration that Ordinance No. 10, and "all zoning ordinances" of Oakwood, were unconstitutional both facially, and as applied[1] to Landowners and for the municipality's failure to have a separate comprehensive plan. The remaining counts, which prayed for damages under several theories, were not reached since they hinged on the ruling of Count I. Pursuant to Rule 74.01(b) the trial court determined the appealability in its declaration that its ruling was final and appealable. The trial court did not take up Landowners' request for attorney fees in Count I, under 42 U.S.C. s 1988 and under Missouri Declaratory Judgment Act ss 527.010 – .130 RSMo 1986, or in any of the other five counts. Landowners have cross-appealed on this non-ruling of attorney fees. Their cross-appeal will be addressed at the end of this opinion.

At the very heart of this appeal lies the issue of whether a Missouri municipality may enact valid zoning ordinances without having first formally adopted a "comprehensive plan," under s 89.040, which provides that regulations on zoning and districts " . . . shall be made in accordance with a comprehensive plan. . . . "

Summary judgment was granted on the portion of Landowners' petition which sought declaratory relief

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[1] The issue of whether Ordinance No. 10 is unconstitutional as it applied to Chiavola and Flott was not preserved on appeal. Both parties directed their efforts towards the facial unconstitutionality of Ordinance No. 10 and therefore we focus on that issue. This court finds even had they chosen to assert an as applied argument, the Ordinance was constitutional as it applied to their land.

from Oakwood's only ordinance, Ordinance No. 10, relating to zoning and land use. Ordinance No. 10 was adopted in 1955, shortly after residents of a housing subdivision were incorporated as a village under s 80.020 RSMo 1986. The ordinance limited the use of the 80 lots comprising Oakwood to single-family residential use with a lot size of 30,000 square feet.

Oakwood is now bordered by a major thoroughfare, North Oak Trafficway (North Oak), as well as a portion of Kansas City and other villages in Clay County. North Oak carries approximately 25,000 cars per day and contains many commercial properties in the other municipalities it passes through.

In 1981 the Landowners, Chiavola and Flott purchased a house in Oakwood located on a six acre lot. They sought to rezone the portion of their land which abuts North Oak, approximately 4.7 acres, for commercial use. Oakwood's zoning commission, and later its trustees, denied the rezoning petition. The circuit court reversed, holding among other reasons; Ordinance No. 10 was invalid because Oakwood had not previously adopted a "comprehensive plan" pursuant to chapter 89, and the ordinance would not suffice as both the zoning "plan" and the zoning ordinance. As a result of the demise of Ordinance No. 10 Oakwood presently has no zoning ordinance on any land within its boundaries.

Ordinance No. 10 was the product of an Oakwood Zoning Commission hearing held in February, 1955, which recommended to the Trustees that the boundaries of Oakwood be zoned as "one residential district." Attached to the Commission's report was a description of

the 80 lot plats of Oakwood. The report and subsequent ordinances provided for streets and parks but no commercial areas. This ordinance was passed in March, 1955. Although amendments were made to Ordinance No. 10 in 1966 and 1967, Oakwood has limited the land use to single-family dwellings.

There are two arguments which Oakwood, Appellants, presents as error to this court: 1) Ordinance No. 10 is not facially unconstitutional; and 2) it is not statutorily invalid. The parties, in both their briefs and arguments, seem to confuse the issues of constitutionality and statutory validity. This opinion will first outline the constitutional issues, and then the statutory issue. This court finds Ordinance No. 10 to be both constitutionally and statutorily sound and, therefore, reverses the judgment. Landowners cross-appeal is dismissed.

Standard of Review

Since zoning and refusal to rezone are legislative acts, this court reviews de novo any challenges to their validity. *J.R. Green Properties, Inc. v. Bridgeton*, 825 S.W.2d 684, 686 (Mo.App.1992); *Elam v. St. Ann*, 784 S.W.2d 330 (Mo.App.1990). This court is to first determine whether or not the legislative judgment was fairly debatable, and if it is, then the decision must stand. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); *Binger v. Independence*, 588 S.W.2d 481 (Mo. banc 1979). There is a presumption of validity for zoning ordinances; the presumption is rebuttable, but Landowners bear the burden of proving Ordinance No. 10 is unreasonable in order to successfully rebut the presumption. *Elam*, 784

S.W.2d at 335; *Flora Realty & Inv. Co. v. Ladue*, 362 Mo. 1025, 246 S.W.2d 771, 778 (banc 1952). Where there is uncertainty regarding the reasonableness of a zoning regulation, it is to be resolved in the government's favor. *Flora Realty*, 246 S.W.2d at 778.

I. Constitutional Attack

A. Reasonableness

The first point on appeal is that the court erroneously held Ordinance No. 10 to be unconstitutional. An ordinance may be either facially unconstitutional or unconstitutional as applied to a particular tract of land. Here it is asserted that on its face, Ordinance No. 10 is unconstitutional. The due process clauses of the Fourteenth Amendment to U.S. Constitution and the Missouri Constitution, Art. 1 s 10, require zoning "to bear a substantial relationship to health, safety, morals or the public welfare." *Flora Realty*, 246 S.W.2d at 778. The constitutional standard is essentially one of reasonableness. *White v. Brentwood*, 799 S.W.2d 890, 892 (Mo.App.1990), (citing *Vatterott v. Florissant*, 462 S.W.2d 711, 713 (Mo.1971)). Zoning may be unreasonable on its face or as applied to a particular tract of land. In Missouri, courts not only "determine whether application of the zoning is substantially related to the alleged purpose of the zoning, but also the private detriment caused by such application." *Elam v. St. Ann*, 784 S.W.2d at 334. Therefore, even where the zoning is related to the public welfare, the zoning may be considered unconstitutional where it demonstrates a detriment to private interests which outweighs the public benefit from retaining it. *Id.* at 334-335.

What is reasonable depends on the requirements of the locality, for what might be reasonable in one place may be unreasonable in another. *Flora Realty,* 246 S.W.2d at 778. The fact that economic loss will be sustained if the ordinance is upheld is not controlling; nor does the fact that neighboring or adjoining land is less restrictively zoned establish that the regulation is arbitrary or unfairly discriminatory. *Id.* at 779.

Here the zoning regulation, calling for single-family residential use, is facially reasonable. The general plan, as it can be inferred from Ordinance No. 10, its amendments via subsequent ordinances, and the development of Oakwood, was to establish a small bedroom community consisting of 80 homes. The ordinance provided for the single-family homes, churches and community buildings, public parks, and accessory uses customarily incident to the other allowable uses not involving the conduct of business or industry. This court cannot say the zoning ordinance does not bear a substantial relationship to public health, safety, morals or general welfare and, therefore, is unreasonable or, that the detriment to Landowners outweighs the public benefits.

B. Comprehensive Single Use Zoning

The judgment also infers the ordinance is facially unconstitutional because it provides for only one type of zoning . . . single-family residential. *McDermott v. Calverton Park,* 454 S.W.2d 577 (Mo. banc 1970), controls on this issue. The Court in *Calverton Park* overruled a portion of its earlier ruling in *Moline Acres v. Heidbreder,* 367 S.W.2d

568 (Mo.1963), which held a municipality could not adopt a single-use zoning ordinance.

In Moline Acres, the city was incorporated as a village and adopted a single-use zoning ordinance. The Court held the Missouri statutes were "never intended . . . to give to a municipality the power to adopt a one use district zoning ordinance encompassing the whole town." *Id.* at 573. Thus, the Court found the village lacked the authority to enact such an ordinance. *Id.*

The Supreme Court of Missouri, in *Calverton Park* specifically overruled the quoted portion of *Moline Acres* saying, "We have read and reread the applicable statutes and find nothing therein to indicate a legislative intent that, under all circumstances, a municipality must provide for more than one use in its zoning ordinance." *Calverton Park,* 454 S.W.2d at 577. This is especially true for small bedroom communities situated in large metropolitan areas. *Id.* at 581. In *Calverton Park,* the village consisted of approximately 1700 residents and was situated between the cities of Florissant and Ferguson in the St. Louis area. *Id.* at 579. Due to its location, there was an abundance of commercial facilities located within a short distance from the village. *Id.* at 580. The ordinance in question allowed for public buildings, parks, golf courses and four zoning districts, all of which were restricted to single-family residential use. *Id.* at 579.

Clarkson Valley Estates Inc. v. Clarkson Valley, 630 S.W.2d 151 (Mo.App.1982) further supports the proposition that single-use zoning is legally permissible. In Clarkson Valley, the court held single-family residential zoning for the entire village was "legally permissible and

factually justified given the nature of the community involved." *Id.* at 153. The Village of Clarkson Valley was incorporated in 1952 and zoned primarily as single-family residential area. *Id.* at 152. Several years later, a landowner in the village attempted to develop his 25 acres of land commercially and, as a result, the village rezoned his portion of land as commercial. The residents of the village were adamantly opposed to the rezoning. *Id.* at 152. A short time later the village returned to the single-family residential zoning and the landowner was prohibited from any further commercial development. *Id.* at 153.

Under s 89.020 RSMo 1986, the legislative body of Oakwood is permitted to use zoning to promote health, safety, morals, and general welfare of its residents. "Certainly, where commercial and professional services are conveniently available elsewhere, none of those purposes would be enhanced by multiple-use zoning as compared to one-family dwelling use." *Calverton Park,* 454 S.W.2d at 582. In addition, the objectives of s 89.040 are to "lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; and to avoid undue concentration of population." Those objectives are better served by a single-use zoning ordinance than they would be from multiple-use zoning in such a small area. *Id.* The Village of Oakwood is a bedroom community which has been divided into 80 lots and borders the neighboring city of Gladstone near North Oak Trafficway, Barry Road and Vivion Road (all heavily traveled thoroughfares). There are numerous commercial facilities located a short distance from Oakwood. Given the nature of the community,

it was appropriate for Oakwood to zone all of the land in its boundaries as single-family residential.

C. Comprehensive Plan

Contrary to the assertion by Landowners, there is no requirement for the existence of a separate comprehensive plan in order for a zoning regulation to be constitutional. While the existence of a separate well-delineated plan may make it easier to establish an appropriate use of Oakwood's police power, and the reasonableness of the regulation or ordinance, it is not a constitutional requirement. *See, e.g., Central Motors Corp. v. City of Pepper Pike,* 63 Ohio App.2d 34, 409 N.E.2d 258, 280 (1979); *Bruno v. Brown,* 414 Pa. 361, 200 A.2d 405 (1964). If it were a constitutional requirement, all zoning prior to the enactment of s 89.040 which requires all zoning to be done "in accordance with the comprehensive plan," would have been unconstitutional. Furthermore, even if it were a constitutional requirement, a plan may be inferred from Ordinance No. 10, and Oakwood's subsequent zoning ordinances (specifically ordinances 33, 46, 48, and 66), that Oakwood planned on being a small residential bedroom community.[2]

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[2] s 89.140 RSMo 1986 provides:
Previous ordinances to remain in force: Wherever any municipality pursuant to an act of the legislature of this state shall have adopted an ordinance or ordinances for any of the purposes covered by sections 89.010 to 89.140, such ordinance or ordinances shall be deemed to have been adopted under the provisions of sections 89.010 to 89.140, and it shall not be

II. Statutory Attack

The second part of the appeal is that Ordinance No. 10 is invalid due to Oakwood's failure to provide a comprehensive plan pursuant to s 89.040 RSMo 1986. s 89.040 provides:

> Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air- . . . . Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the values of buildings and encouraging the most appropriate use of land throughout such municipality. (emphasis added).

In their petition, Landowners assert, since there is not a separate document or documents designated as the "comprehensive plan," Oakwood did not comply with the statute. Remember that the requirement of a plan is based on the premise that zoning regulations are not an end in

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> necessary in such cases for the local legislative body to appoint a zoning commission as provided in section 89.070. All such ordinances shall remain in full force and effect except so far as they shall be inconsistent with the provisions of sections 89.010 to 89.140, until they shall have been amended, altered or repealed by such legislative body.

There is some argument, although not put forth by Oakwood, that the preamble to Ordinance No. 10 was itself a comprehensive plan and therefore satisfies 89.040 pursuant to this statute. This opinion, however, proceeds under the theory that there was no separate plan.

and of themselves, but are the means to the end to sound planning for the public good. *Dawson v. Blaine County*, 98 Idaho 506, 509, 567 P.2d 1257, 1260 (1977). Zoning "does no more than apply the rules of good housekeeping to public affairs. It keeps the kitchen stove out of the parlor, the bookcase out of the pantry, and the dinner table out of the bedroom." *Lebanon v. Woods*, 153 Conn. 182, 215 A.2d 112, 121 (1965) (Murphy, J., dissenting) (citing Metzenbaum, Law of Zoning (1930) p. 6) (Judge Murphy dissents because the zoning provision in Woods did not regulate use in addition to the area). The requirement of a comprehensive plan is not a 'mere technicality which serves only as an obstacle for public officials to overcome in carrying out their duties" but, rather, is the essence of zoning. *Udell v. Haas*, 21 N.Y.2d 463, 288 N.Y.S.2d 888, 893, 235 N.E.2d 897, 900-901 (1968). Without a plan there can be no rational allocation of land use. *Id.* The crux of this appeal is the question: what form must a comprehensive plan take in order to comply with s 89.040?

There is no definition of a comprehensive plan in chapter 89, governing zoning and planning of municipalities in Missouri. The language used in the Missouri statute mirrors that used in the Standard State Zoning Enabling Act, which has acted as the model for a majority of the states – i.e., all regulations must be "in accordance with the comprehensive plan." While there is not an exact definition, it can be said that a:

> " 'plan' connotes an integrated product of a rational process and "comprehensive" requires something beyond a piecemeal approach, both to be revealed by the ordinance in relation to the physical facts and the purposes authorized" by

statute. *Kozesnik v. Montgomery, Twp.*, 24 N.J. 154, 131 A.2d 1 (1957).

Oakwood cites *Strandberg v. Kansas City,* 415 S.W.2d 737 (Mo. banc 1967) as providing the definitive answer to this case. This court does not agree. In *Strandberg,* the city had a comprehensive plan, but it was not enacted by the City Council of Kansas City. The court noted that in a:

> "narrower sense there is a comprehensive plan for each of the districts in that the regulations and restrictions must be uniform for each class or kind of building throughout each district. In a larger sense the term may properly be applied to the general zoning ordinance in effect at a particular time including all valid amendments thereto." *Id.* at 744. (cites omitted).

The Court didn't reach the issue of whether a separate plan must exist in order for the zoning ordinance to be valid. This court notes, however, the Eastern District has held that, "Generally, the comprehensive plan referred to in the decisions are the zoning ordinances and maps." *Treme v. St. Louis County,* 609 S.W.2d 706, 715 (Mo.App.1980), citing *Strandberg,* 415 S.W.2d 737.

No additional guidance is provided for the 89.040 language "comprehensive plan" in the statutes. This court therefore, looks to other jurisdictions for guidance. The notes accompanying the 1926 version of the Standard State Zoning Enabling Act indicate:

> " . . . the draftsman intended to require some planning as an integral part of the zoning process. It is equally clear that no provision for the preparation or adoption of a written plan beyond the text of the zoning ordinance was

> spelled out in the act or referred in the notes. It remained for the courts to give dimension to the requirement that zoning regulations be made in accordance with a comprehensive plan." *Dawson Enterprises, Inc. v. Blaine County*, 98 Idaho 506, 509, 567 P.2d 1257, 1260 (1977) (citing 1 Anderson, American Law of Zoning s 5.03, p. 265 (2nd Ed.1976)).

This court finds the better reasoned cases, as they apply to the fact pattern at hand, are those which do not require a comprehensive plan separate and apart from the zoning ordinance itself. This court holds a comprehensive plan may be validly enacted in an ordinance itself without existing in some form separate from the ordinance. *See Furtney v. Simsbury Zoning Com.*, 159 Conn. 585, 271 A.2d 319 (1970); *Lebanon v. Woods*, 153 Conn. 182, 215 A.2d 112 (1965); *Dawson Enterprises, Inc. v. Blaine County*, 98 Idaho 506, 567 P.2d 1257 (1977) (superseded by legislative act requiring passage of a comprehensive plan prior to zoning ordinances); *Drake v. Craven*, 105 Idaho 734, 672 P.2d 1064 (App.1983); *Nottingham Village Inc. v. Baltimore County*, 266 Md. 339, 292 A.2d 680 (1972); *Allred v. Raleigh*, 7 N.C.App. 602, 173 S.E.2d 533 (1970); *Kozesnik v. Montgomery*, 24 N.J. 154, 131 A.2d 1 (1957); *Asian Americans For Equality v. Koch*, 72 N.Y.2d 121, 531 N.Y.S.2d 782, 527 N.E.2d 265 (1988); *Osiecki v. Huntington*, 170 A.D.2d 490, 565 N.Y.S.2d 564 (2 Dept.1991). *See Bousquet v. Transportation Ins. Co.*, 354 Mass. 152, 235 N.E.2d 807 (1968); *Columbia Oldsmobile Inc. v. City of Montgomery*, 56 Ohio St.3d 60, 564 N.E.2d 455 (1990); *Tulsa Rock Co. v. Board of County Comm'rs*, 531 P.2d 351, 357 (Okla.App.1974); *Bruno v. Brown*, 414 Pa. 361, 200 A.2d 405 (1964); *Bell v. Elkhorn*, 122 Wis.2d 558, 364 N.W.2d 144 (1985). Comprehensiveness may be found in the fact the ordinance zones all, or

substantially all, of a political subdivision; that it regulates all uses; or that it covers all of the usual factors of land utilization, height area and use. Haar, *In Accordance with a Comprehensive Plan*, 68 Harv.L.Rev. 1154, 1158-1167 (1955).

First, in looking at the statutes themselves, there is no mandate requiring Oakwood to adopt a separate plan as a condition precedent to the enactment of the ordinance. *Central Motors Corp.*, 409 N.E.2d at 280; *Dawson*, 567 P.2d at 1261. Furthermore, "the general rule has become . . . that, absent specific requirements in enabling legislation, the comprehensive plan need not have a separate physical existence apart for the zoning ordinances, and it need not be in writing, but its design may be found in the scheme apparent in the zoning regulations themselves." *Dawson*, 567 P.2d at 1261 (cites omitted). Where the enabling statute expressly requires the adoption of a comprehensive plan as a condition precedent to the passage of zoning regulations and ordinances, then a different result must occur. *Id.* 567 P.2d at 1262; *Baker v. Milwaukie*, 17 Or.App. 89, 520 P.2d 479 (1974); *Pro-Eco v. Board of Comm'rs*, 956 F.2d 635 (7th Cir.Ct.App.1992).

There are a number of cases from other jurisdictions which have been faced with the issue now before this court.

Kozesnik v. Montgomery Twp., 24 N.J. 154, 131 A.2d 1 (1957), an oft-cited case, is one of the earlier cases to attack this question. In Kozesnik, the plaintiff landowners challenged the validity of amendments to zoning ordinances of two townships, Hillsborough and Montgomery, proposed by a rock mining company (Minnesota Mining

and Manufacturing Co.). The amendments permitted the mining company to quarry and process rock in Hillsborough and establish a plant to color the rock for roofing granules in Montgomery. At the time of the application for amendment the relevant areas were zoned for agricultural or residential uses. Both townships had few people living in them; most of the land in the townships was used for farming, a few businesses were also there. *Id.* 131 A.2d at 4-5.

Plaintiffs contended the amendments were not in accordance with the comprehensive plan. *Id.* 131 A.2d at 6. Their first argument was that there could not be a comprehensive plan unless it was evidenced in writing separate from the regulation itself. *Id.* The court said a "plan" connoted an integrated product of a rational process and "comprehensive" requires something beyond a "piecemeal approach," which was evidenced by the ordinance considered in relation to the physical facts and purposes as authorized by the New Jersey statute. *Id.* 131 A.2d at 7. The court held the plan did not have to have a separate physical form . . . the "plan may readily be revealed in an end-product – here the zoning ordinance – and no more is required by statute." *Id.* 131 A.2d at 8.

In *Town of Lebanon v. Woods*, 153 Conn. 182, 215 A.2d 112 (1965), Woods, in 1961, bought a tract of land, approximately 400 acres, with the intention of establishing a housing development of 1060 houses built on 1/4 acre lots. At the time he purchased the land, the town was without zoning. *Id.* 215 A.2d at 114. In 1961, Lebanon was almost exclusively residential; there were 750 homes and 9 small commercial or mercantile establishments. *Id.* 215 A.2d at 116. In April, 1962, Lebanon adopted zoning

which required one acre as the minimum lot size throughout the town. *Id.* 215 A.2d at 114. Following the adoption of the ordinance Woods built fourteen homes on lots smaller than an acre. Lebanon received an injunction restraining Woods from furthering his housing development unless he complied with the zoning regulations. Defendant appealed the injunction and Lebanon took a cross appeal. *Id.* 215 A.2d at 114.

Defendant, as one of his points on appeal, asserted the regulations were invalid because they were not adopted with reference to a comprehensive plan as required by law. *Id.* 215 A.2d at 115-116. The court noted the regulations "disclose a comprehensive plan imposing lot area, building placement and minimum living space requirements on all property in the town as a whole except that special and less drastic requirements are made applicable to "seasonal" dwellings. . . . " The type of plan used must "depend in large part on the character of the locality of for which they are designed." *Id.* 215 A.2d at 117. The court held:

> The mere fact that the regulations obviously would have been improved had they contained provisions governing in more detail the future development of the town and protecting the town against the possible indiscriminate intrusion of business, mercantile or industrial enterprises would not, under the circumstances of this particular case, including the rural, sparsely populated, almost wholly residential character of the town and the absence of any threat of such commercial instruction, justify in holding the regulations void. *Id.*

In *Dawson Ent. Inc. v. Blaine County,* 98 Idaho 506, 567 P.2d 1257 (1977), Dawson was an Illinois corporation

doing business in Idaho and is the stockholder of Dawson Ramsey Motor Sales, a General Motor Franchise in Ketchum. Dawson decided its existing location was outmoded and bought the property in dispute, a tract of 12.8 acres, for its new location. The parcel in dispute was a wedge shaped piece of property with the apex of the triangle consisting of Highway 93 on the west which intersected with the Union Pacific railroad right-of-way on the east. The land was zoned for one acre agricultural/residential. Dawson applied for rezoning which was denied. The court held there did not have to be a separate comprehensive plan because "by the adoption of the zoning ordinances and the use of the Blaine County Planning and Zoning objectives, a plan was adopted sufficiently to comply" with Idaho law. *Id.* 567 P.2d at 1261.

In *Osiecki v. Huntington*, 170 A.D.2d 490, 565 N.Y.S.2d 564 (2 Dept.1991) the court held there need not be a separate plan where the plaintiffs challenged the zoning of its land, (approximately five and one-half acres) for residential use. The neighboring properties were not of the same zoning or use. Two parcels to the west were zoned for commercial office buildings and have been used as such; the property to the south and east are zoned residential, but were used for farm and water district purposes by the Town. *Id.* 565 N.Y.S.2d at 565.

Similarly, this court finds that Oakwood acted in conformance with its comprehensive plan because the preamble to the ordinance indicated an intent to create a single residential district with the same boundaries as the incorporated Oakwood; because there was a meeting by the trustees of the village which appointed a zoning

commission to meet and make recommendations regarding regulations. The board met and the notice for a public hearing was given. The commission made its final record at the meeting and recommended the ordinance be enacted. The ordinance was subsequently enacted. The ordinance was comprehensive in scope; setting out the area, height, and use requirements. Since there is evidence that planning was done, and there is no specific requirement that the village pass a separate comprehensive plan as a condition precedent to the passage of zoning ordinances. This court finds that Ordinance No. 10 was both constitutionally and statutorily valid.

This opinion does not stand for the proposition that a municipality, no matter what its size, does not have to adopt a comprehensive plan separate from the zoning ordinance. What was sufficient for Oakwood in this case, an ordinance which provided comprehensive zoning for a single land use, and which evidenced future plans for the community, will not necessarily suffice for all larger towns or cities. *Woods,* 215 A.2d at 117; *Nottingham Village,* 292 A.2d at 688. Without a comprehensive plan, courts in situations such (as the case at bar), will have to determine on an ad hoc basis whether their efforts meet the requirement of creating a "general plan to control and direct the use and development of property in a municipality." Id. 215 A.2d at 116. The summary judgment ruling Ordinance No. 10 invalid is reversed.

Landowners cross-appeal as to their request for attorney's fees is dismissed. The trial judge noted in the judgment, and in a subsequent clarification hearing, that the issue of fees was not being addressed and, therefore,

was still an issue to be decided with the balance of the case.

The judgment is reversed, the cross-appeal is dismissed, and the cause is remanded.

/s/ Harold L. Lowenstein
Harold L. Lowenstein, Judge

IN THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI

STATE OF MISSOURI, ex rel., GEORGE A. CHIAVOLA and CONNIE S. FLOTT, et al.,	)	
Relators-Plaintiffs	)	Case No. CV191-4103CC
vs.	)	Division Two
THE VILLAGE OF OAKWOOD,	)	
Respondents-Defendants.	)	

ORDER GRANTING PARTIAL SUMMARY JUDGMENT AND ENTERING DECLARATORY JUDGMENT

Now on this 29th day of July, 1993, the court makes the following findings and orders:

On the 22nd day of July, 1993, the above-numbered cause came on to be heard on Relators-Plaintiffs' (Plaintiffs) Motion for Summary Judgment on Count I and Respondent-Defendants' (Defendants) Motion for Summary Judgment. Plaintiffs appeared in person and by their attorney Robert H. Freilich, and Defendants appeared by their attorney James P. Ralls, Jr.

The Court having fully read and considered Plaintiffs' Motion for Summary Judgment and Suggestions in support thereof as well as Defendants' Suggestions in Opposition to Plaintiffs' Motion and Defendants' Motion for Summary Judgment, having heard and considered the arguments of counsel, and being fully advised in the premises, finds that no genuine issue as to any material fact exists and that Plaintiffs are entitled to summary judgment as a matter of law as to Count I of Plaintiffs' First Amended Petition. The court therefore sustains Plaintiffs' Motion for Summary Judgment as to Count I and grants Partial Summary Judgment on Count I of the

First Amended Petition. All remaining counts of the First Amended Petition and Defendants' Motion for Summary Judgment as it pertains to issues not addressed in this Order remain pending and are unaffected.

As to Count I of Plaintiffs' First Amended Petition, the Court finds, adjudges, declares and decrees that Ordinance No. 10 of the Village of Oakwood, Missouri (the "Zoning Ordinance of the Village of Oakwood") as well as all zoning legislation and zoning regulations adopted pursuant to Ordinance No. 10 are unconstitutional as set forth in Count I of Plaintiffs' First Amended Petition. The Court further holds that Ordinance No. 10 as well as all zoning legislation and regulations adopted pursuant to said Ordinance do not have any supportive plan as required by Chapter 89 RSMo and state law. Accordingly, Ordinance No. 10 as well as all zoning legislation and zoning regulations adopted pursuant to said Ordinance are hereby declared void, invalid and unenforceable.

The Court finds that there is no just reason for delay with respect to entry of the above Order Granting Partial Summary Judgment and Entering Declaratory Judgment; and, pursuant to Supreme Court Rule 74.01(b), the Court determines this Order to be final and appealable with respect to the specific claim hereby adjudicated. This Order is entered and final this 29th day of July, 1993.

/s/ David W. Russell
David W. Russell
Circuit Judge, Division Two
Circuit Court of Clay County

Dated: 7/29/93

Missouri Court of Appeals

October 4, 1994

IMPORTANT NOTICE

TO: ALL ATTORNEYS OF RECORD

RE: STATE EX REL. CHIAVOLA, GEORGE A., ET AL., APPELLANT - RESP

vs.

VILLAGE OF OAKWOOD, MO., ET AL., RESPONDENT - APPELLANT

WD# 48239

Please be advised that Appellant-Respondent's motion for Rehearing is OVERRULED and motion for transfer to Supreme Court is DENIED. See Rule 83.03.

PEGGY STEVENS MCGRAW
CLERK DOCKET ATTORNEY

cc: Stephen James Moore
James Franklin Ralls

In The Supreme Court of Missouri

No. 77409
W.D. No. 48239

September Session, 1994

State ex rel. George A. Chiavola
and Connie S. Flott,

Respondents,

vs. (TRANSFER)

The Village of Oakwood, Missouri,
et al.,

Appellants.

Now at this day, on consideration of respondents' application to transfer the above-entitled cause from the Western District Court of Appeals, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1994, and on the 22nd day of November, 1994, in the above-entitled cause.

Given under my hand and seal
of said Court, at the City
of Jefferson, this 22nd day
of November, 1994.

/s/ Thomas Simon Clerk
_____ D.C.